

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

VIVORENE JONES)	
Claimant)	
VS.)	
)	Docket No. 264,766
KANSAS CITY KANSAS COMMUNITY COLLEGE)	
Respondent)	
AND)	
)	
TIG INSURANCE COMPANY and)	
KANSAS ASSOCIATION OF SCHOOL BOARDS)	
Insurance Carriers)	

ORDER

Respondent and one of its insurers, the Kansas Association of School Boards, requested review of the June 16, 2004 Award entered by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on November 9, 2004. Stacy Parkinson of Olathe, Kansas, participated in this claim as Board Member Pro Tem in place of Board Member Julie A. N. Sample.

APPEARANCES

Michael W. Downing of Kansas City, Missouri, appeared for claimant. Thomas R. Hill of Overland Park, Kansas, appeared for respondent and TIG Insurance Company (TIG). And Frederick J. Greenbaum of Kansas City, Kansas, appeared for respondent and the Kansas Association of School Boards (KASB).

RECORD AND STIPULATIONS

The parties' stipulations and the record considered by the Board are listed in the Award. In addition, the parties also stipulated that claimant's average weekly wage as of the April 8, 2004 regular hearing was \$704.30.¹

¹ R.H. Trans. at 20-21.

ISSUES

Claimant filed an application for hearing with the Division of Workers Compensation on March 29, 2001, alleging she had injured both arms (and her “body as a whole”) due to repetitive work activities, “including but not limited to maintenance and keyboard work on computers” The application for hearing stated claimant’s injuries occurred “all days before and after” January 31, 2001.

In the June 16, 2004 Award, Judge Hursh awarded claimant permanent partial general disability benefits for a 23 percent whole body functional impairment.² Moreover, the Judge concluded the appropriate date of accident for this repetitive trauma injury was April 7, 2004, which was the day before the regular hearing.

Respondent and KASB contend the Judge erred. They argue the appropriate date of accident for this repetitive trauma injury should be April 16, 2001, when claimant was allegedly first offered surgery. As that date is during TIG’s coverage period, KASB contends TIG should be responsible for this claim. In the alternative, should the Board determine KASB is responsible for the benefits in this claim, KASB contends all of claimant’s functional impairment is preexisting and, therefore, claimant should not receive any permanent disability benefits after applying the reduction of K.S.A. 44-501(c). Finally, KASB also argues, should the Board determine the appropriate date of accident is within its coverage period, that claimant’s award of permanent disability benefits should be reduced due to her alleged unreasonable refusal to undergo surgery.

On the other hand, both TIG and claimant contend the Award should be affirmed as April 7, 2004, was the appropriate date of accident under Kansas law. Claimant also argued that she did not unreasonably refuse surgery as she did not want to risk a worsening of her hands due to surgery.

The issues before the Board on this appeal are:

1. What is the appropriate date of accident for claimant’s repetitive trauma injury?
2. What permanent disability should be awarded?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties’ arguments, the Board finds and concludes:

² See K.S.A. 44-510e.

The Award should be affirmed. The Board adopts the findings and conclusions set forth by the Judge as its own. In summary, claimant developed a repetitive trauma injury to both upper extremities while working for respondent. Claimant's symptoms began in 2000 and by April 2001 her physician recommended surgery. When TIG failed to authorize surgery, claimant continued performing her regular job duties, which she was performing through the date of her April 8, 2004 regular hearing. As of the regular hearing, claimant had grown accustomed to her symptoms and did not want to risk surgery. The Judge correctly determined that *Kimbrough*³ controlled the finding regarding claimant's date of accident. *Kimbrough* states:

When a claimant continues to work in the same position that caused his or her injuries, the date of injury in a repetitive micro-trauma case is the last date the claimant worked prior to the administrative hearing.⁴

Consequently, the Board affirms the Judge's finding that claimant's date of accident for determining and computing her workers compensation benefits is April 7, 2004.

Respondent and KASB's argument that the "[d]ate of accident should not be a moving target subject to manipulation by an employee, employer or insurance carrier"⁵ is worthy of comment, although not persuasive in this case or under current law. It is true that a "repetitive use" type of injury poses substantial frustration in terms of determining a specific date of accident. That is the nature of this type of injury. With a repetitive use injury, there is not, in fact, a specific date of accident.

But the placement of arbitrary "bright line" tests to determine a specific date of accident in repetitive use injury cases can be unfair to the parties. In this case, the fact finder was confined by the *Kimbrough* decision and could not, therefore, make a determination that would be fair and equitable to all parties. While there is no evidence any party manipulated the accident date in this claim, that possibility exists in many repetitive use injury claims. That is an unfortunate consequence of "bright line" rules.

In this case, there is only one employer although the insurance coverage changed. Although it is arguable both insurance carriers should share responsibility, *Kimbrough* is controlling in this case and the Judge's decision should be affirmed on that basis.

³ *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003).

⁴ *Id.* at Syl. ¶ 2.

⁵ Respondent and KASB's Brief at 10 (filed Aug. 2, 2004).

The Board affirms the Judge's finding that claimant was entitled to receive an award for a 23 percent permanent partial general disability. The Board concludes K.S.A. 44-501(c) does not apply to these facts and, therefore, claimant's award should not be reduced due to preexisting functional impairment.

Claimant's injury to her bilateral upper extremities occurred over a period of time. And the date of accident for that period represents not only the last day of that period but the entire period of injury. Consequently, the functional impairment that accrues over the period of accidental injury is not deducted from the ultimate disability. In summary, claimant's permanent partial general disability is not reduced by any preexisting functional impairment rating under these circumstances.

Finally, the Board concludes claimant did not unreasonably refuse to undergo surgery to her arms. K.A.R. 51-9-5, which provides that benefits may be denied or terminated when there is an unreasonable refusal to submit to medical or surgical treatment, is not applicable.

AWARD

WHEREFORE, the Board affirms the June 16, 2004 Award entered by Judge Hursh.

IT IS SO ORDERED.

Dated this ____ day of November 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael W. Downing, Attorney for Claimant
Thomas R. Hill, Attorney for Respondent and TIG
Frederick J. Greenbaum, Attorney for Respondent and KASB
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director